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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RUTH RAYNER and REVEREND JESSE L. DAVIS,
Petitioners

v.

SHIRLEY CLENDENING,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. May a district court ignore the deterrent function of Rule 11 and impose an award of full fees without considering or making any findings of fact as to why a lesser sanction would not have been equally effective?

II. May a district court award fees as sanctions on the basis of a conclusory affidavit which does not itemize hours expended or document a reasonable hourly rate and which contains hours spent defending a related case in state court?

III. May fees be awarded by an appellate court absent a showing of bad faith on the part of the appellant or his attorney in pursuing an appeal found frivolous?

IV. May a district court and a court of appeals impose a sanction of attorneys fees without affording an attorney the opportunity to contest the merits of the determination; or, if clear from the pleadings and/or briefs, an opportunity to offer evidence in mitigation which would justify the imposition of a lesser penalty?

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No. ——

RUTH RAYNER and REVEREND JESSE L. DAVIS,
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v.

SHIRLEY CLENDENING,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Ruth Rayner and Reverend Jesse L. Davis respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above-entitled proceedings on August 20, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not reported and may be found in Appendix A. The decision of the United States District Court for the Northern District of Texas is also not reported and may be found in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 20, 1986 and a timely application

for rehearing was denied on September 17, 1986. Appendix C. Mr. Justice White subsequently entered an order extending the time for filing of the petition to and including January 15, 1987. A. 388. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1) (1982).

STATUTES AND RULES INVOLVED

Rule 11. [F.R.C.P.] Signing of Pleadings, Motions and Other Papers: Sanctions

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

28 U.S.C. § 1988:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

28 U.S.C. § 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

Rule 38. [Fed. R. App. P.] Damages for Delay

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

Petitioner Ruth Rayner, a sole practitioner in Dallas, Texas, entered into a contingency-fee contract with Petitioner Reverend Jesse L. Davis to represent Davis in a tort suit against Orkin Exterminating in a state court in Texas. Following reversal of a $31,000 judgment against Orkin, the trial court ruled that Davis qualified as a "pauper" and that his case should proceed on that basis. The second trial resulted in a verdict for Orkin. Davis' status was subsequently changed to that of an ordinary litigant. This engendered a dispute between Rayner and the court reporter, Respondent Clendening.[1] From the viewpoint of Rayner, Clendening's inadequate preparation of the statement of facts and objection to the charge to the jury coupled with the inclusion of misstatements and failure to incorporate certain exhibits resulted in Petitioner Davis' decision to settle the case for $15,000, an amount contended to be less than that anticipated if Clendening had properly performed her duties.

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[1] The primary reason for the argument related to Clendening's responsibilities under state law when one is proceeding as an ordinary litigant as compared to that of a pauper.

Following settlement, Respondent's motion for payment of reporting fees from the appeal bond was contested. The trial judge awarded $3,231.50, an amount which reflected a deduction for an unordered pauper's narrative and for monies expended by Rayner for the services of another reporter to complete unfinished work. Appeals from this judgment were unsuccessfully pursued by Rayner to the Texas Supreme Court and the amount due Clendening was paid in August of 1985.

Petitioner Rayner also filed a 1983 damage suit in the Northern District of Texas alleging that Clendening's failure to perform adequately her reporting responsibilities violated the due process rights of Petitioner Davis. After answering, Respondent filed a motion for summary judgment coupled with a request for fees under 42 U.S.C. § 1988 and Rule 11 of the Federal Rules of Civil Procedure. In support of the latter, Respondent's co-counsel filed an affidavit in support of an award in the amount of $7,650. It alleged: (1) the case had been defended by two attorneys, one of which had practiced for less than one year; (2) between the two attorneys, fifty-five hours of unitemized time had been spent defending the federal case, as well as thirty-five hours (not itemized) spent on defending appeals in the state courts of Texas; (3) a reasonable hourly rate for these services was eighty-five dollars. Without a hearing, the district court entered summary judgment, and held that the defenses of *res judicata* and qualified immunity precluded suit. The court further concluded that the suit was groundless and, pursuant to section 1988 and Rule 11, awarded $7,500 in fees "jointly and severally" against petitioners. App. B at 17a.

The Fifth Circuit placed the case on its summary calendar and limited its affirmance on the merits to the qualified immunity defense. With respect to sanctions imposed, it concluded that the district court "did not abuse its discretion" inasmuch as petitioners had "frivo-

lously pursued [a] . . . civil rights" claim. Responding to a motion filed pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1927 seeking an additional three thousand dollars for the taking of a "frivolous appeal," the court found that it (the appeal) was "no more reasonable than the underlying action . . . filed in district court," and remanded for an additional award of fees and "for an apportionment of the amounts between Davis and his attorney." App. A at 6a-7a.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION.

This is an important case. First, it involves the full panoply of major rules and statutes now employed by the lower courts to sanction counsel and clients for the bringing of "frivolous" litigation. Although this Court has assumed responsibility for providing substantive guidance with respect to awarding fees to "prevailing" parties, minimal attention has been given to criteria to be employed regarding the appropriateness of an award of fees against counsel (and his or her client) pursuant to these provisions. Second, the instant case presents a situation in which precedent limited to subjective bad faith[2] is inapplicable. Third, amended Rule 11 is specifically designed to perform a *deterrent* rather than a compensatory function. The court of appeals, however, approved an award which failed to set forth any findings of fact or conclusions of law as to why a lesser sanction (small lump-sum award, reprimand, etc.) was incompatible with the goals of the Rule. Fourth, the lower court's affirmance of an award of fees under Rule 11 based solely on an affidavit which, on its face,

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[2] *Compare Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980) ("vexatiously, or for oppressive reasons"), *with Pennzoil Co. v. Texaco, Inc.*, 784 F.2d 1133 (2d Cir. 1986), *prob. jur. noted*, 54 U.S.L.W. 3840 (U.S. June 23, 1986).

is fatally defective, presents a major issue relating to the level of review to be exercised by the courts of appeal. Fifth, at the appellate level, the case presents the important question of when and under what circumstances Rule 38 and 28 U.S.C. § 1927 may be employed to authorize a fee award. Sixth, at both the district and appellate levels, the lack of opportunity to contest the sanctioning decision or offer evidence with respect to an appropriate punishment raises unresolved questions of due process. Finally, decisions with respect to all of the foregoing present a clear conflict in circuits.

II. THE DECISION BY THE LOWER COURT TO AFFIRM AN AWARD BY A DISTRICT JUDGE WHO DID NOT CONSIDER THE DETERRENCE FUNCTION OF RULE 11 AND WHO RELIED SOLELY ON A CONCLUSORY AFFIDAVIT WHICH INCORPORATED TIME SPENT IN STATE COURT IS IN CONFLICT WITH OTHER CIRCUITS.

Amended Rule 11 contains a substantive portion dealing with filings which a "reasonable inquiry" would reveal are not well grounded in fact or law. It also has a remedial segment authorizing district court judges to impose "appropriate" sanctions which "*may* include an order to pay the other party" a "*reasonable* attorney's fee." (emphasis added). The Advisory Committee Notes make clear that any decision to impose sanctions must take into consideration that "the word 'sanctions' in the caption . . . stresses a deterrent orientation" [3] and that, for purposes of insuring that this goal is met, the district courts are vested with wide "discretion to tailor sanctions to the particular facts of the case . . . ." The Rule clearly incorporates a basic philosophy that a deterrent is only appropriate when it is the *minimum* that will serve to

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[3] *See also* S. M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 29 (Fed. Judicial Center 1985) ("[T]he majority of judges . . . expressed a belief that deterrence is the most important purpose of sanctions").

adequately deter undesirable behavior. Schwarzer, *Sanctions Under the New Federal Rule 11*, 104 F.R.D. 181, 201 (1985) ("The basic principle governing the choice of sanctions is that the least severe sanction adequate to serve the purpose should be imposed.").

In the instant case, the district court award was based on a skeleton affidavit which, in addition to claiming as compensable over thirty hours of unitemized time spent in state court, lacked the degree of specificity which would support a "reasonable attorney's fee" award for prevailing parties in statutory fee-shifting litigation. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed."). The Fifth Circuit, employing the abuse of discretion standard of review, affirmed. A similar award in other circuits would have been reversed.

In *Matter of Yagman*, 796 F.2d 1165, 1184-85 (9th Cir. 1986), the Ninth Circuit reversed a lump-sum sanction in the form of fees with the admonition:

> When the sanctions award is based upon attorney's fees and related expenses, an essential part of determining the reasonableness of the award is *inquiry* into the reasonableness of the claimed fees. Recovery should *never* exceed those expenses and fees that were reasonably necessary to resist the offending action . . . *There is no need to rigidly apply* [*the twelve-factor test*] [4] *but the court must make some evaluation of the fee breakdown submitted by counsel.* (Emphasis added).

Similarly, the Seventh Circuit will reverse an award of full fees pursuant to section 1988 when unaccompanied by analysis. Its position: "In order to be able to effectively review the trial court's decision [imposing fees] the [district] court *must* offer some articulation of the

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[4] *See Johnson v. Georgia Highway Ry. Express*, 488 F.2d 711 (5th Cir. 1974).

reasons supporting the amount of the award." *Munson v. Friske*, 754 F.2d 683, 697 (7th Cir. 1985) (emphasis added). *See also Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986); *Yagman, supra* at 1185 (lump-sum awards must take into consideration counsel's ability to pay).[5]

The reason for requiring district courts to articulate the basis for the penalty selected is to insure that the deterrent function of Rule 11 is the *primary* consideration for the sanction. As stated by the Ninth Circuit: "It is critical . . . that the sanctioning court embrace the overriding purpose of deterrence and mold its sanctions in each case so as to best implement that policy." 796 F.2d at 1184. The approach taken by the Seventh and Ninth Circuits is clearly articulated by Chief Judge Weinstein of the Northern District of New York:

> Determining the kinds of sanctions and the amount of fees, if any, to be imposed requires the consideration of the following factors: a) the cost of the Rule 11 violation to the party seeking sanctions, and b) mitigating factors such as (i) whether the client and lawyer believed they were correct in taking the course they did; (ii) whether there was vindictiveness or a desire to punish an opponent; (iii) whether the lawyer is a neophyte who needs education, a repeat offender, or a person of standing at the bar whose actions have heretofore been ethical and in the high tradition of the bar; (iv) the ability to pay; (v) the need for compensation; (vi) the degree of frivolousness; and (vii) the dangers in chilling the particular kind of litigation involved.

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[5] *Compare Nisby v. Commissioner's Court*, 798 F.2d 134, 137 (5th Cir. 1986) (reversing and remanding a section 1988 "prevailing party" award after finding that district court decision "lacks a complete explanation for the fees as set") *with United States v. Nesglo, Inc.*, 744 F.2d 887, 892 (1st Cir. 1984) (approving lodestar calculations of district court as appropriate method to compute amount of sanctions).

[*Eastway Const. Corp. v. City of New York*, 637 F. Supp. 558, 571 (E.D.N.Y. 1986)].

In the instant case, over thirty hours of noncompensable time spent in state court litigation was awarded by the district court. Moreover, the record is barren as to the methodology employed to determine that an award of fees was necessary to carry out the policy of deterrence found in Rule 11. The decision below approving this interpretation of Rule 11 is in conflict with the Rule's policies and interpretations given it by other circuits. Certiorari should be granted to resolve the issue.

III. THE DECISION BY THE COURT BELOW TO IMPOSE SANCTIONS ON COUNSEL WITHOUT MAKING A SPECIFIC FINDING THAT THE APPEAL WAS TAKEN IN BAD FAITH IS IN CONFLICT WITH OTHER CIRCUITS.

Residing in relative obscurity, 28 U.S.C. § 1927 (1982), originally provided that only "excess costs" could be assessed by trial and appellate courts against attorneys who multiply litigation in a manner which could be characterized as "unreasonable and vexatious." As then interpreted, the provision could only be invoked "in instances of a serious and studied disregard for the orderly processes of justice." *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969) (long history of unprofessional conduct coupled with misstatements of law and harassing tactics). In 1980, the statute was amended to provide an additional penalty of "attorney's fees reasonably incurred" because of unreasonable and vexatious conduct. The Conference Report on the amendment states unequivocally that the "existing standard" of dilatory behavior is the criterion for interpreting the statute.[6] On the floor of the House,

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[6] H. CONF. REP. NO. 96-1234, 98th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & AD. NEWS 2781, 2782. *See also Antitrust Procedural Improvement Act of 1979: Hearings on S. 390 Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on*

Congressman Mazzoli further emphasized what he believed to be the understanding reached by the conferees:

> The managers on the part of the House were firm in their resolve to maintain the tough standard of current law so that the legislation in no way would dampen the legitimate zeal of an attorney in representing a client.
>
> Under the agreement of the managers, an attorney may be required to pay costs, as well as expenses and attorneys' fees reasonably incurred on account of such attorney's dilatory conduct. But the standard is that in current law, not the less severe standard the Senate had agreed to originally.

[126 CONG. REC. 23625 (1980)].

In spite of a clear legislative history, the lower courts have taken divergent views "upon whether the language 'unreasonably and vexatiously' is to be applied literally or whether it implies a bad faith or intentional misconduct requirement not explicit" in the statutory language. *Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982). As exemplified by the decision below, the Fifth Circuit applies the statute literally and imposes liability on the basis of, among other things, counsel's "ignorance" in pursuing an appeal found frivolous.[7] Similarly, the

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the Judiciary, 96th Cong., 1st Sess. 8, 27 (1979); *Antitrust Procedural Improvements & Jurisdictional Amendments: Hearings on H.R. 4047 before the Subcomm. on Monopolies & Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 23, 60, 152 (1979) (*Kiefel v. Las Vegas Hacienda* cited as the correct interpretation of the "restrictive standard").

[7] *See, e.g., Brown v. Nationwide Mut. Ins. Co.*, slip op. at 1347 (5th Cir. Dec. 15, 1986) (sanctions proper if appeal is "totally without merit"); *In re Ginther*, 791 F.2d 1151, 1156 (5th Cir. 1986) ("At oral argument, [the attorney] demonstrated an almost unbelievable ignorance of the facts of the case."); *In re Cajun Elec. Power Corp., Inc.*, 791 F.2d 353, 366 (5th Cir. 1986) ("mandamus proceeding is inappropriate and essentially frivolous"); *Hale v. Harney*, 786 F.2d 688, 692 (5th Cir. 1986) (appeal "ground-

Sixth Circuit holds that section 1927 "does not require a finding of recklessness, subjecitve bad faith or conscious impropriety." *Haynie v. Ross Gear Div.*, 799 F.2d 237, 243 (6th Cir. 1986). The First Circuit appears to be in accord. *United States v. Nesglo, Inc.*, 744 F.2d 887, 892 (1st Cir. 1984). *See also, Baker Indus. v. Cerberus, Ltd.*, 764 F.2d 204, 215 n.3 (3d Cir. 1985) (Higginbotham, J., dissenting) (discussion of present conflict in circuits). In contrast, the Second,[8] Third,[9] Fourth,[10] Seventh,[11] Eighth,[12] Ninth,[13] and Eleventh [14] circuits will only impose sanctions when there is clear evidence of "bad faith."

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less and frivolous"); *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985) (appeal labeled "vexatious [and] unreasonable" on basis of counsel's "puzzling and exasperating" argument); *Hagerty v. Succession of Clement*, 749 F.2d 217, 222 (5th Cir. 1984), *cert. den.*, 106 S. Ct. 333 (1985) ("ignorance of a section 1983 cause of action . . . .").

[8] *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (imposition of sanctions under § 1927 requires a "clear showing of bad faith.").

[9] *Ford v. Temple Hosp.*, 790 F.2d 342, 347 (3d Cir. 1986) ("[T]here must be a finding of willful bad faith on the part of the offending attorney.").

[10] *See Blair v. Shenandoah Women's Center, Inc.*, 757 F.2d 1435 (4th Cir. 1985) (numerous instances of misconduct that tally up to subjective bad faith).

[11] In *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 227 (7th Cir. 1984), the court held that intent could be inferred from a total lack of legal or factual basis for a suit and from extrinsic or circumstantial evidence on the record.

[12] *Jaquette v. Black Hawk County*, 710 F.2d 455, 462 (8th Cir. 1983) (bad faith).

[13] *Malhoit v. Southern Cal. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) (deliberate misquote of overruled statute sufficient evidence of intent).

[14] *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (11th Cir. 1986) (court "may impose sanctions on a showing of the attorneys' recklessness or bad faith.").

The restrictive approach to section 1927 is exemplified by the Seventh Circuit. It employs an approach to "bad faith" that can only be met by the filing of a meritless action by an attorney with *actual knowledge* that the legal position taken is frivolous. Deliberate misquoting of precedent, for example, "omitting a sentence that undercut[s]" the position taken is sufficient to show the requisite intent knowingly to abuse the judicial process. *McCandless v. Great Atlantic & Pac. Tea Co.*, 697 F.2d 198, 202 (7th Cir. 1983). The circuit also refuses to construe the statute to penalize "incompetence," *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 227 n.2 (7th Cir. 1984), stressing, once again, that even though a claim may not have any plausible basis, liability cannot be imposed without a finding of intent on the part of counsel. *Id.* at 228.

No circuit which employs the "bad faith" standard would categorize a single appeal taken in good faith from an adverse decision by a district court the type of "studied disregard for the orderly processes of justice," targeted by section 1927. The decision of the Fifth Circuit is in direct conflict with that of other appellate courts thereby warranting plenary consideration by this Court.

IV. THE DECISION BY THE COURT BELOW TO IMPOSE SANCTIONS ON THE PARTY REPRESENTED WITHOUT MAKING A SPECIFIC FINDING THAT THE APPEAL WAS TAKEN IN BAD FAITH IS IN CONFLICT WITH OTHER CIRCUITS.

The lower court concluded its opinion by pointing out that Reverend "Davis and his attorney should have paid closer attention to the merit of their appeal after having had sanctions imposed by the district court." App. at 7a. From this premise, the court imposed sanctions against Petitioner Davis under Rule 38, and held that the

appeal was no more objectively "reasonable than the underlying action he filed in the district court." *Id.*

Rule 38 provides that, in addition to costs, an appellate court may award "just damages" for the filing of a frivolous appeal. Although it reflects the same approach as this Court's rule 49.2 (which has been sparingly employed to assess token sanctions),[15] it is now interpreted by many circuits to authorize a wide variety of sanctions, including the assessment of attorney's fees. *See generally,* Martineau, *Frivolous Appeals, The Uncertain Federal Response,* 1984 DUKE L. J. 845, 868 (1984). When, and under what circumstances a fee award is appropriate, however, presents a conflict in circuits.

The Fifth Circuit construes the Rule to incorporate an objective determination of unreasonableness; an appeal which "involves legal points not arguable on their merits." App. A at 7a. Other circuits, however, view sanctions under the Rule as "highly unusual" and impose a requirement that prior to imposition, there must be a "clear showing of *bad faith* on the part of the appellant in pursuing a frivolous appeal." C. WRIGHT, E. COOPER, G. GRESSMAN, FED. PRAC. & PROC., JURISDICTION § 3984, p. 465 (1977) (Emphasis added).

In *Reid v. United States,* 715 F.2d 1148 (7th Cir. 1983), the Seventh Circuit established a "two-part analysis [which] is *required* to determine whether costs and damages should be assessed under Rule 38." *Id.* at 1154 (Emphasis added). First, whether the appeal is frivolous. Second, the determination "must be made . . . whether the case is an appropriate one for the imposition of sanctions." *Id.* at 1155. This requires a finding of "appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or

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[15] *E.g., Tatum v. Regents,* 462 U.S. 1117 (1983) ($500 in damages).

harassment or out of sheer obstinancy." *Id.* That circuit now makes findings of *specific* acts demonstrating bad faith prior to imposing fees as sanctions. *Spiegel v. Continental Ill. Bk.*, 790 F.2d 638, 650 (7th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3392 (U.S. Dec. 2, 1986) (fees awarded after determination that brief presented no "arguable reasons" for reversal and that sanctions were necessary to "curb appellant's litigous proclivities"); *Trecker v. Scag*, 747 F.2d 1176, 1179-80 (7th Cir. 1984), *cert. den.*, 105 S.Ct. 2140 (1985) (the taking of additional appeals after circuit made clear its position in the case, warrants finding of "sheer obstinancy"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 737 F.2d 580 (7th Cir. 1984) (fees warranted by appellant's attempt to relitigate issue previously appealed); *Reid v. United States*, 715 F.2d at 1155 (fees appropriate pursuant to finding that duplicative litigation was brought solely for the purpose of harassment).[16] Similarly, although findings of substantive frivolity are warranted, that court has rejected sanctions absent a showing of bad faith. *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 862 (7th Cir. 1985) (although appeal frivolous, no evidence that affidavits in support of plaintiff's case were filed in bad faith); *Oglesby v. RCA Corp.*, 752 F.2d 272, 280 (7th Cir. 1985) (although appeal was lacking in merits, sanctions not imposed, court unable to determine that appeal was taken in "bad faith"); *Gilles v. Burton Const. Co.*, 736 F.2d 1142, 1146-47 (7th Cir. 1984) (although appeal "frivolous," "the appellants have had nothing to gain by delay or the harassment of an appeal" and therefore no bad faith).

As with the analysis applied to Rule 11 and section 1927, the lower court's interpretation of Rule 38 of the Federal Rules of Appellate Procedure is in conflict with

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[16] *See also Glick v. Gutbrod*, 782 F.2d 754 (7th Cir. 1986) (fees against pro se appellants; refusal to retain counsel and finding of bad faith litigation brought solely to harass).

other circuits. The issue is confusing and important to all who litigate in the federal judicial system thereby warranting plenary consideration by this Court.

V. THE CASE PRESENTS AN IMPORTANT QUESTION OF DUE PROCESS INVOLVING THE RIGHT TO AND NATURE OF A HEARING WHICH MUST BE AFFORDED BY THE DISTRICT COURTS AND THE COURTS OF APPEAL BEFORE SANCTIONS MAY BE AWARDED AND WITH RESPECT TO WHICH THERE IS A CONFLICT IN CIRCUITS.

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), this Court admonished that prior to taking action resulting in financial penalties against counsel there should be "fair notice and an opportunity for a hearing on the record." In keeping with this requirement, the Advisors Notes for Rule 11, although warning against "satellite litigation," point out that "the procedure [used to impose sanctions] obviously must comport with due process requirements." Similarly, in 1980 when section 1927 was amended to provide for the assessment of fees against counsel, the House Conference Report admonished:

> The managers intend that judges applying section 1927 will safeguard the rights of an attorney who may be held in violation of the section. Before sanctioning an attorney under section 1927, the court is to afford the attorney all appropriate protections of due process available under law.

[1980 U.S. CODE CONG. & AD. NEWS, 2781, 2783].

The proposition was reemphasized on the floor of the House:

> The managers on the part of the House and the Senate *strongly* agreed that judges who utilize section 1927 sanctions must make every effort to safeguard the rights of an attorney who may be held in violation of that section. In so doing, it is *impera-*

> *tive* that the court afford the attorney all appropriate protections of due process available under law.

[126 CONG. REC. 23625-26 (1980) (Emphasis added)].

Demands for due process protection by this Court, Congress, and the Advisory Committee resulted in no protection for Petitioner Rayner. Rather, sanctions in the instant case were imposed in an environment in which she was offered *no* opportunity to defend herself once the decision was made that sanctions were seriously contemplated.

As previously set forth, circuits other than the Fifth now require that any award of sanctions by district courts be premised on a record accompanied by findings of fact which provide a clear nexus between the sanction selected and the deterrent function of Rule 11. By way of restatement, even if a substantive determination of frivolousness can be made on the basis of legal arguments made to the court, issues such as motives, professional background, degree of frivolousness, financial status, and need for compensation must necessarily be resolved in order to insure that the sanction selected is proper. Contrary to the summary procedure approved by the Fifth Circuit in the instant case, the Ninth Circuit now requires that a show-cause procedure be employed by the district courts. The reasoning:

> There are, in fact, several compelling reasons why notice, an opportunity to prepare a defense, and a hearing are required before sanctioning counsel. These procedural requirements will ensure that: (1) the attorneys will have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; (2) the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct; and (3) the facts supporting the sanction will appear in the record, facilitating appellate review . . . .

[*Miranda v. Southern Pacific Trans. Co.*, 710 F.2d 516, 522-23 (9th Cir. 1983)].

Similarly, the Third Circuit in *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 571 (3d Cir. 1985), pointed out:

> [S]uch [due process] procedures will afford the judge adequate time to evaluate the propriety of the particular sanction in light of the offending attorney's explanation as well as to consider alternatives. . . . Moreover, by providing a record, a hearing will facilitate appellate review. . . . Upon imposing . . . a sanction it would seem appropriate for the district court to make adequate written findings.

See also Ford v. Alfara, 785 F.2d 835, 840 (9th Cir. 1986) ("district court abused its discretion in imposing sanctions without first giving notice of its intent to do so and without affording an opportunity for a hearing").

With respect to section 1927 sanctions imposed at the appellate level, similar considerations are also appropriate. Although the Fifth Circuit remanded the instant case for a determination of the amount of fees, Petitioner Rayner will not be offered an opportunity to present arguments that a lesser sanction would be proper. Not only does this approach contravene the legislative history of section 1927, it is in conflict with existing precedent.

Two circuits have either implicitly or explicitly recognized due process protections. *Limerick v. Greenwald*, 749 F.2d 97, 101 (1st Cir. 1984) (section 1927 sanctions imposed after numerous warnings in published and unpublished opinions); *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 227 (7th Cir. 1984) ("court should provide counsel with some opportunity to be heard"). *See also McCandless v. Great Atlantic & Pac. Tea Co., Inc.*, 697 F.2d 198, 201-02 (7th Cir. 1983) (sanction imposed after opportunity for explanation given). On this issue, Judge Boochever of the Ninth Circuit provides a most thoughtful analysis of the proper procedural response to section 1927. Starting with the premise that the statute is penal in nature and that attorney liability "require[s] bad faith and intentional misconduct," *Malhoit v. Southern Cal.*

Retail Clerks Union, 735 F.2d 1133, 1139 (9th Cir. 1984) (Boochever, J., dissenting), he argues that courts have two choices prior to the imposition of sanctions. First, notice to counsel during argument with ample opportunity to respond. Second, with respect to cases placed on the summary calendar (as was the instant decision), the issuance of "an order to show cause why a penalty should not be imposed." *Id.* at 1139.

Rayner's predicament raises the issue of what procedural protections should have been afforded under the Due Process Clause, a matter of significant importance to all members of the bar. *See, e.g.*, 1985 RECORD 313, 324-26 (proposals of Committee on Federal Courts of the New York Bar requiring a hearing in *all* cases in which sanctions are imposed). The approach approved by the Fifth Circuit runs contrary to the legislative history of section 1927 and the interpretation given Rule 11 by the Advisory Committee. In addition, the decision conflicts with that of other circuits thereby warranting plenary review by this Court.

VI. CONCLUSION.

In the context of the grossest of abuses of the federal judicial system an award of fees under section 1927 is obviously appropriate.[17] Moreover, although Rule 11 does

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[17] In *Limerick v. Greenwald*, 749 F.2d 97, 101-02 (1st Cir. 1984), the court, after giving numerous warnings, imposed sanctions on counsel with the conclusion:

> Despite exploding caseloads, we have been very reluctant to enter sanctions for frivolous or vexatious appeals because we do not wish to chill the right of appeal. Where, as here, though, the counsel for appellant has not simply filed a frivolous and vexatious appeal but is before this court for the fourth time raising fundamentally the same issues, the need to impose sanctions is obvious. To fail to do so would be to permit counsel to continue a course of conduct which has passed the border of advocacy and entered the realm of harassment.

not incorporate a good faith/bad faith distinction, it is obvious from the language of the provision and the Advisory Committee Notes that the heavy arsenal of sanctions available (including an award of fees) should be reserved for those members of the bar engaged in intentional behavior. With respect to good faith litigation, and especially those cases which are handled with the minimal exertion of judicial energy, the deterrent function of the Rule will be well served by insuring that the penalty imposed is the minimal required to preclude reoccurrence of the behavior in question. Most important, if retribution against counsel is contemplated, under no circumstances should an award of full fees be imposed absent the clearest record, accompanied by findings of fact and conclusions of law, that the award is appropriate. The issues in this case are ripe for consideration. A grant of certiorari is appropriate.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1022

Summary Calendar

JESSIE L. DAVIS,
Plaintiff-Appellant,

versus

SHIRLEY CLENDENING,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(August 20, 1986)

Before RUBIN, JOHNSON, and JONES, Circuit Judges.*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Edith H. Jones, Circuit Judge:

Appellant Jesse Davis appeals from the district court's grant of appellee Shirley Clendening's motion for summary judgment and sanctions. Davis maintains that Clendening's performance in her capacity as an official court reporter deprived him of his civil rights, including his rights to due process as guaranteed by the Fifth and Fourteenth Amendments, and by 42 U.S.C. § 1983.

For the reasons presented below, we affirm the district court's entry of summary judgment and award of costs and attorneys' fees in favor of Clendening. Furthermore, we grant Clendening's motion for additional sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1927.

I. *FACTS*

The facts leading up to this current appeal began approximately ten (10) years ago when Davis commenced an action in state court to recover damages for personal injuries he sustained in an accident. Although Davis received a favorable judgment, it was reversed and remanded for a new trial following appeal. Davis lost at the second trial and another appeal was brought. As part of this appeal, Davis requested that the official court reporter, Clendening, prepare certain transcripts.

Because Clendening was unable to supply promptly and timely the Statement of Facts needed by Davis to prosecute the appeal, Davis sought and received three extensions of time from the court of appeals. Clendening eventually completed the Statement of Facts and delivered it to Davis. Davis was dissatisfied with a portion of the Statement of Facts, however, and hired another court reporter to perform additional work.

Before the state court of appeals ruled on the appeal, Davis settled with his opposing party. Soon afterwards, Clendening filed a motion for payment of her reporting

fees out of Davis's appeal bond. Davis responded to protest Clendening's motion and seek a petition to perpetuate her testimony. A hearing followed, and the state court denied Davis's petition to perpetuate testimony and awarded Clendening her reporting fees less: (1) the amount paid by Davis to have the additional work completed by the other court reporter; and (2) the cost of a narrative prepared by Clendening which Davis had been unable to use.

These rulings resulted in yet another state court appeal. Due to a lack of jurisdiction, the state appeals court dismissed the appeal of the trial court's denial of the petition to perpetuate testimony. Ultimately, the appeal of the award to Clendening was dismissed for failure to prosecute and Davis's attempts to gain a rehearing in the state appeals court were unsuccessful. Likewise, the Texas Supreme Court refused to consider an untimely application for a writ of error filed by Davis.

While his appeal of the award granted to Clendening was still pending in state court, Davis instituted a new, separate section against Clendening in federal court pursuant to 42 U.S.C. § 1983. The complaint filed in this action alleged in broad, unexplained terms that Clendening's derelictions as an official court reporter had deprived him of his rights to due process.

In a memorandum opinion granting summary judgment, the district court concluded that, as a matter of law, every one of Davis's claims was barred by the principles of res judicata and by the qualified immunity afforded Clendening as a government official. Moreover, finding this civil rights action groundless and such that a reasonable inquiry would have revealed its lack of merit, the district court, pursuant to Fed. R. Civ. P. 11 and 42 U.S.C. § 1988, imposed sanctions, ordering Davis and his attorney to pay the costs and attorneys' fees incurred by Clendening in defending this action.

II. *QUALIFIED IMMUNITY*

The law is clear on the issue of qualified immunity: it will be granted to those government officials who, while operating in the course and scope of their employment, perform discretionary functions. This qualified immunity protects these officials as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). There is no doubt that official court reporters are entitled to qualified immunity for actions taken under their "lawful authority and [while] following in good faith the instructions or rules of the Court and [if their actions are] not in derogation of those instructions or rules." *McLallen v. Henderson*, 492 F.2d 1298, 1300 (8th Cir. 1974) *cited with approval in Slavin v. Curry*, 574 F.2d 1256, 1265-66 *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978), *overruled on other grounds* in *Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976, 978 (5th Cir. 1979) (en banc).

Here, Davis alleges that Clendening did not prepare materials for appeal as promptly as he would have liked, that some of the materials were unsuitable when she finally did prepare them, that she omitted necessary materials, and that she made some factual errors. These derelictions, Davis argues, forced him to spend extra money [1] and caused him to settle with the opposing party for less than he would have had Clendening prepared the materials in a more timely and accurate manner.[2] For these reasons, Davis maintains that he was deprived "of his civil rights, including his rights to due process as

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[1] Because the state trial court deducted from Clendening's fee the extra money expended by Davis to hire another court reporter, this assertion is absolutely without merit.

[2] The record contains no allegations of fact to support this conclusion.

guaranteed by the Fifth and Fourteenth Amendments." Davis fails to explain, and the record does not reflect exactly how the derelictions of this court reporter could rise to a constitutionally cognizable due process claim. Likewise, Davis fails to cite which statutes, if any, were violated by Clendening's conduct. Moreover, there is no assertion that Clendening's performance substantially prejudiced Davis's ability to obtain relief in state court, nor any assertion that he was denied due process in the state court proceedings which resulted in Clendening's award for services rendered. The best Davis offers is that Clendening failed strictly to comply with a few rules of Texas Civil Procedure. There is no evidence, however, that Clendening intentionally disregarded these rules or acted in bad faith.

The Constitution does not guarantee litigants the services of an infallible court reporter. Davis neither alleged nor submitted any evidence showing he suffered a constitutional or statutory harm because of Clendening's performance. Accordingly, he failed to state a claim under section 1983 of 42 U.S.C., and dismissal of his case would have been proper for that reason. Fed. R. Civ. P. 12(b)(6). When bringing a section 1983 action, "we consistently require the claimant to state specified facts, not merely conclusory allegations." Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985). Clendening did not seek, and the district court did not grant, dismissal and sanctions on this basis, however. Instead, summary judgment was entered, in part, upon Clendening's qualified immunity as an official court reporter.[3]

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[3] Other decisions rendered by this Circuit may have provided additional reasons for dismissal of this claim. For example, a state court action brought in federal court under a claim of civil rights will be barred as long as the state court provides due process of law to the wronged party. *Holloway v. Walker*, 790 F.2d 1170, 1174 (5th Cir. 1986). Since this approach was not advanced by Clendening, it will not be relied upon in this appeal. Clendening did, how-

Because Davis presented no facts tending to show that Clendening violated clearly settled law, or that she, in bad faith, disregarded the instructions of rules of the court, he raised no issue of material fact which would have justified piercing the qualified immunity of Clendening. Hence, we agree with the District Court's entry of summary judgment on this basis.

III. *RES JUDICATA*

Davis also argues that the district court erred in holding that his section 1983 claim was barred by the doctrine of *res judicata.* We need not address this issue because the district court's entry of summary judgment on the basis of Clendening's qualified immunity was sufficient in and of itself to dispose of Davis's complaints. This is not to suggest that there is no merit to this claim nor that the district court erred in its ruling on this issue.

IV. *SANCTIONS*

Relying upon Rule 11 of the Federal Rules of Procedure and 42 U.S.C. § 1988, the district court ordered Davis and his attorney to pay the costs and expenses incurred by Clendening in defending this action. Davis either knew or should have known that Clendening would be entitled to qualified immunity unless some evidence existed that she acted in bad faith or violated clearly settled law. In spite of Clendening's qualified immunity, Davis frivolously pursued this civil rights action and by

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ever advance another argument for dismissal in a letter citing additional, new authority. The case cited clearly sets forth the proposition that "litigants may not obtain review of state court actions by filing complaints about those actions in lower federal courts cast in the form of civil rights suits." *Hale v. Harney,* 786 F.2d 688, 691 (5th Cir. 1986) citing *Sawyer v. Overton,* 595 F.2d 252 (5th Cir. 1979) and *Kimball v. The Florida Bar,* 632 F.2d 1283 (5th Cir. 1980).

doing so, attempted to fashion a civil rights action out of a claim that should have been timely and properly prosecuted in the state court system. *See Holloway v. Walker*, 790 F.2d 1170, 1174 (5th Cir. 1986); *Hale v. Harney*, 786 F.2d 688, 691 (5th Cir. 1986). We find that the district court did not abuse its discretion in imposing the sanctions.

Turning to Clendening's Motion for Sanctions under the Fed. R. App. P. 38, and 28 U.S.C. § 1927, it has been held that an appeal is frivolous when it "involves legal points not arguable on their merits." *Hagerty v. Succession of Clement*, 749 F.2d 217, 222 (5th Cir. 1984), *cert. denied*, —— U.S. ——, 106 S.Ct. 333, 88 L.Ed. 2d 317 (1985), citing *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). Davis's appeal is no more reasonable than the underlying action he filed in district court. Davis and his attorney should have paid closer attention to the merit of their appeal after having had sanctions imposed by the district court. By bringing this appeal, they have multiplied the groundless proceedings. While we have no desire to discourage wholesale the filing of appeals from federal district court decisions, we stress that litigants must carefully examine the merits of their grievances before instituting appeal of a summary termination founded on threshold issues in the case and enforced by the application of Rule 11 sanctions.

Because Davis's complaint in no way passes muster as a viable constitutional case, we grant Clendening's motion for sanctions and award costs and attorneys' fees against Davis and his attorney. Fed. R. App. P. 38; 28 U.S.C. § 1927. We remand to the district court for determination of the amounts owed and for an apportionment of the amounts between Davis and his attorney.

The district court's judgment is AFFIRMED and the case REMANDED for award of attorneys' fees and costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA 3-84-1777-G

JESSIE L. DAVIS,
Plaintiff,

vs.

SHIRLEY CLENDENING,
Defendant.

[Filed Dec. 10, 1985]

MEMORANDUM ORDER

I. *Introduction*

Plaintiff Jessie L. Davis ("Davis") instituted this action under 42 U.S.C. § 1983 [1] complaining of the performance of defendant Shirley Clendening ("Clen-

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[1] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress....

dening") in her capacity as official court reporter for the 14th Judicial District Court in Dallas, Texas.

Clendening moves for summary judgment under Rule 56 and for sanctions under Rule 11, Fed. R. Civ. P. For the reasons stated below, her motions are granted.

II. *Factual Background*

In 1976, Davis commenced a civil action in the 14th District Court. He obtained a judgment in his favor, but an appellate court reversed and remanded for a new trial. After the jury returned a verdict adverse to him on the retrial, Davis filed a notice of appeal and requested that Clendening prepare certain transcripts. Believing that Davis was proceeding on a pauper's affidavit, Clendening filed a narrative statement of facts in accordance with Tex. R. Civ. P. 380 as it then existed.

Dissatisfied with this narrative statement, Davis's attorney requested a statement of facts in question-and-answer form, which Clendening could not immediately supply. Davis requested, and the Court of Appeals granted, several extensions of time in which to file the question-and-answer statement of facts. It was eventually filed prior to submission of the appeal. Because Davis's counsel was not satisfied with one aspect of Clendening's statement of facts, however, she engaged another court reporter to prepare a supplemental index. Approximately one month later, Davis settled his case, resulting in an agreed dismissal of the appeal.

Clendening then moved the trial court to order payment, from the appeal bond, of her court-reporting fees. Over Davis's objection, the trial court granted Clendening's motion for payment in the amount requested, less the cost of preparation of the original statement of facts in narrative form, and less the cost expended by Davis's attorney in paying another court reporter to prepare the supplemental index.

Davis appealed this order to the Court of Appeals, which ultimately dismissed his appeal for want of prosecution. Davis failed to file a timely application for writ of error in the Supreme Court of Texas, and his motions for extension of time and for rehearing in that court were denied.

III. *Legal Standard*

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See, e.g.*, Galindo v. Precision American Corp., 754 F.2d 1212, 1216 (5th Cir. 1985); Albertson v. T.J. Stevenson & Company, Inc., 749 F.2d 223, 228 (5th Cir. 1984).

In considering a motion for summmary judgment, the court must inspect the entire record and draw all reasonable inferences in favor of the party opposing the motion. In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 440 (5th Cir. 1982). The movant has the burden of showing that no genuine issue of material fact exists, but the nonmovant must respond to an otherwise sufficient motion:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Fed. R. Civ. P. 56(e). *See, e.g.*, United States v. An Article of Drug Consisting of 4,680 Pails, Each Pail Containing Sixty Packets, 725 F.2d 976, 984-85 (5th

Cir. 1984); Smith v. Flagship International, 609 F. Supp. 58, 62 (N.D. Tex. 1985).

IV. *Analysis*

A. *Davis's Complaints*

Davis complains that Clendening deprived him of a constitutional right by the following acts or omissions:

1. preparing a narrative, rather than a question-and-answer, statement of facts;

2. delaying the preparation of a question-and-answer statements of facts;

3. misstating, in the narrative statement of facts, a fact concerning Davis and his wife;

4. omitting items from the exhibit index; and

5. forcing him to retain the services of another court reporter.

B. *Clendening's Defenses*

Clendening bases her motion for summary judgment on *res judicata* and on her qualified immunity as a court reporter. These grounds will be considered in turn.

1. *Res Judicata*

Clendening contends that the doctrine of *res judicata* bars Davis's §1983 claims because they were, or could have been, litigated in the state court action out of which those claims arose. She points out that Davis not only contested her right to collect her unpaid transcript fees from the appeal bond, but also based his own petition to perpetuate testimony on the same grounds now urged to support his §1983 claims. The fact that Davis was unsuccessful in the state district court, or did not press his claims on appeal, does not—she argues—make *res judicata* any the less applicable.

The rule in this circuit is that

> one who has a choice of more than one remedy for a given wrong . . . may not assert them serially, in successive actions, but must advance all at once on pain of bar.

Nilsen v. City of Moss Point, Mississippi, 701 F.2d 556, 560 (5th Cir. 1983) (*en banc*). *See also* Sidag Aktiengesellschaft v. Smoked Foods Product Co., Inc., —— F.2d. —, No. 84-4664 (5th Cir. Nov. 19, 1985), slip op. at 767. Moreover,

> any inquiry as to the application of the doctrine or *res judicata* must go beyond the procedural vehicle utilized to a pragmatic assessment of "whether or not the primary right and duty and delict or wrong are the same in each action."

Nilsen, 701 F.2d at 561.

This rule applies not only to successive actions in federal court, as in *Nilsen*, but also to successive actions in state and federal court. Migra v. Warren City School District Board of Education, — U.S. —, 104 S. Ct. 892 (1984). *See also* Flores v. Edinburg Consolidated Independent School District, 741 F.2d 773, 774-75, 778-79 (5th Cir. 1984) (§1983 claim barred by final state judgment on same facts); Delesma v. City of Dallas, 770 F.2d 1334, 1336-40 (5th Cir. 1985) (survivors' §1983 claim barred where their decedent's claim would have been barred by prior state judgment).

Here, the record establishes that in the state court action Davis litigated, or could have litigated, the very same grievances he now asserts against Clendening. Consequently, the principle of *res judicata* must be held to bar them.[2]

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[2] It makes no difference that, in the state suit, Davis was opposing Clendening's claim for fees rather than seeking affirmative relief himself. Rule 97(a), Tex. R. Civ. P., required that these complaints against Clendening be asserted as a compulsory counter-

2. *Qualified Immunity*

An official court reporter is entitled to qualified immunity for actions taken pursuant to her lawful authority and in good-faith attention to instructions and rules of the court. Slavin v. Curry, 574 F.2d 1256, 1265-66, *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978); Rheuark v. Shaw, 628 F.2d 297, 305 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

Under Harlow v. Fitzgerald, 457 U.S. 800, 815-18 (1982), a public official qualifiedly immune from civil damages is entitled to summary judgment unless his conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *See also* Saldana v. Garza, 684 F.2d 1159, 1163-64 n.15 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983).

Consequently, Clendening is entitled to summary judgment on the basis of qualified immunity unless Davis can establish that she violated clearly settled law. *Saldana*, 684 F.2d at 1164. Because Davis has not specified any such violation in his response to Clendening's motion, it does not appear that trial is needed to resolve the issue of qualified immunity. *See* First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968) (sufficient evidence of factual dispute claimed to require

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claim. Davis chose, however, not to assert them because of the pendency of this suit. *See* Davis's response to Clendening's motion to dismiss appeal (¶ 3), attached as Exhibit E to the affidavit of Richard A. Rohan. His claims are thus barred by the compulsory counterclaim rule. *See* Restatement of Judgments 2d ¶ 22 (claim precluded if rule of court makes its assertion compulsory and later assertion of it would nullify initial judgment); Allen v. McCurry, 449 U.S. 90, 95-96 (1980) (federal courts required to give preclusive effect to state court judgments when the courts of the state would do so); Crutcher v. Aetna Life Insurance Co., 746 F.2d 1076, 1080 (5th Cir. 1984) (applying Fed. R. Civ. P. 13(a) to bar relitigation of compulsory counterclaim).

a trial must be shown by opponent of motion for summary judgment).

Nevertheless, the summary judgment record on this issue will be considered with respect to each of Davis's complaints.

(A). *Narrative Statement of Facts*

Davis alleges that because Clendening prepared a narrative statement instead of a question-and-answer statement, he was unable to use his objections to the charge as a ground for new trial and, consequently, was denied due process.

By affidavit, Clendening avers that she was under the impression that Davis was proceeding on appeal pursuant to a pauper's oath. She states that she mailed a letter to Davis's attorney explaining that Tex. R. Civ. P. 380 entitled Davis only to a narrative statement and that she received a letter from the attorney acknowledging that Davis was proceeding under a pauper's oath. Clendening further states that "[m]y preparation of the narrative statement of facts was my honest, good faith effort to comply with what I understood the Texas Rules of Civil Procedure to require."

The court concludes, as a matter of law, that Clendening acted in good faith. Moreover, it appears that Davis was not damaged since his appeal was never decided on the merits.

(B). *Delay*

The court concludes that Clendening's delay in preparing the question-and-answer statement of facts was the result of the normal backlog by state court reporters and was not in derogation of any rules or instructions of Texas state courts. Furthermore, Davis filed the statement of facts in the Court of Appeals within the period granted by the extensions and thus suffered no adverse consequences from the delay.

(C). *Misstatement*

Davis asserts that Clendening reported in the narrative statement that he was arrested for running a red light and for aggravated assault when, in fact, his wife was arrested for these offenses. The narrative was not used, however, and Davis does not raise a genuine issue of material fact as to any nexus between the misstatement and a deprivation of his civil rights. Furthermore, the court concludes that Clendening acted in good faith and hence was entitled to qualified immunity.

(D). *Exhibit Index*

Davis complains that Clendening omitted two exhibits from the exhibit index. Clendening responds that one exhibit was neither admitted into evidence nor preserved by offer of proof or bill of exceptions. The other, she states, was lost prior to the delivery of the exhibits to her. Clendening's assertions that her responsibilities as court reporter did not include custody or maintenance of exhibits, that "the omission of exhibit 44 was due to no fault of my own," and that she was acting in accordance with all rules and instructions, are unchallenged.[3] The court therefore concludes that Clendening, as a matter of law, was acting in good faith.

E. *Retention of Another Court Reporter*

Davis alleges that, by compelling him to retain another court reporter, Clendening deprived him of due process. In response, Clendening's affidavit states as follows:

> In preparing the volumes of the supplemental statement of facts, and in numbering these volumes, I

---

[3] Davis attached an unsigned affidavit of a court reporter attesting that Clendening violated Tex. R. Civ. P. 376b, 376c, 377 and the Supreme Court Order relating to the official duties of court reporters. Because the affidavit is unsigned, it is without legal effect. *See* Pension Benefit Guaranty Corporation v. Heppenstall Company, 633 F.2d 293. 300 (3d Cir. 1980).

> was acting pursuant to instructions I had received from employees at the Court of Appeals for the Fifth Supreme Judicial District at Dallas County, Texas. To the best of my knowledge, I was not acting contrary to any rules or instructions of which I was aware, or am now aware. The selection of the manner in which the supplemental statement of facts was prepared and numbered was a good faith effort on my part to perform my duties as best I was able.

Davis does not detail the causal nexus between any error in form in the statement of facts and the alleged deprivation of any federal right, constitutional or statutory. Accordingly, the court concludes that Clendening has negated all issues of fact as to any civil rights violation, or, in the alternative, that Clendening, as a matter of law, acted in good faith.

V. *Attorney's Fees and Sanctions*

The court, in its discretion, may award attorney's fees to the prevailing party in a §1983 civil rights action. 42 U.S.C. §1988. Additionally, Fed. R. Civ. P. 11 authorizes imposition of an "appropriate sanction," including an award of attorney's fees, for violation of its provisions.

Under §1988, fees may be awarded to a prevailing defendant only if the court finds that plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 422 (1978).

The Fifth Circuit recently approved the following test for imposition of a sanction under Rule 11:

> [S]anctions shall be imposed against an attorney and/or for his client when it appears that a pleading has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attor-

> ney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Eastway Construction Corporation v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cited in* Davis v. Veslan Enterprises, 765 F.2d 494, 497 n.4 (5th Cir. 1985).

Under either test, Clendening is entitled to recover the attorney's fees she expended in defending this case. *See also* Elliott v. Perez, 751 F.2d 1472, 1479-81 (5th Cir. 1985) (Rule 11 certificate means that plaintiff's counsel believes in good faith, after reasonable inquiry, that defendant official cannot successfully show entitlement to immunity). Accordingly, Clendening is entitled to recover from Davis and his counsel, jointly and severally, reasonable attorney's fees of $7,500.00.

VI. *Conclusion*

Clendening's motion for summary judgment is GRANTED and Davis's claims for relief are DENIED.

Clendening's motion for attorneys' fees is also GRANTED. Accordingly, she is entitled to recover $7,500.00 from Davis and his counsel, jointly and severally.

SO ORDERED.

December 10, 1985.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1022

JESSIE L. DAVIS,
Plaintiff-Appellant,

versus

RUTH RAYNER, ATTORNEY,
Appellant,

versus

SHIRLEY CLENDENING,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(September 17, 1986)

Before RUBIN, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1164

In the Supreme Court of the United States

October Term, 1986

RUTH RAYNER and REVEREND JESSE L. DAVIS,

Petitioners,

v.

SHIRLEY CLENDENING,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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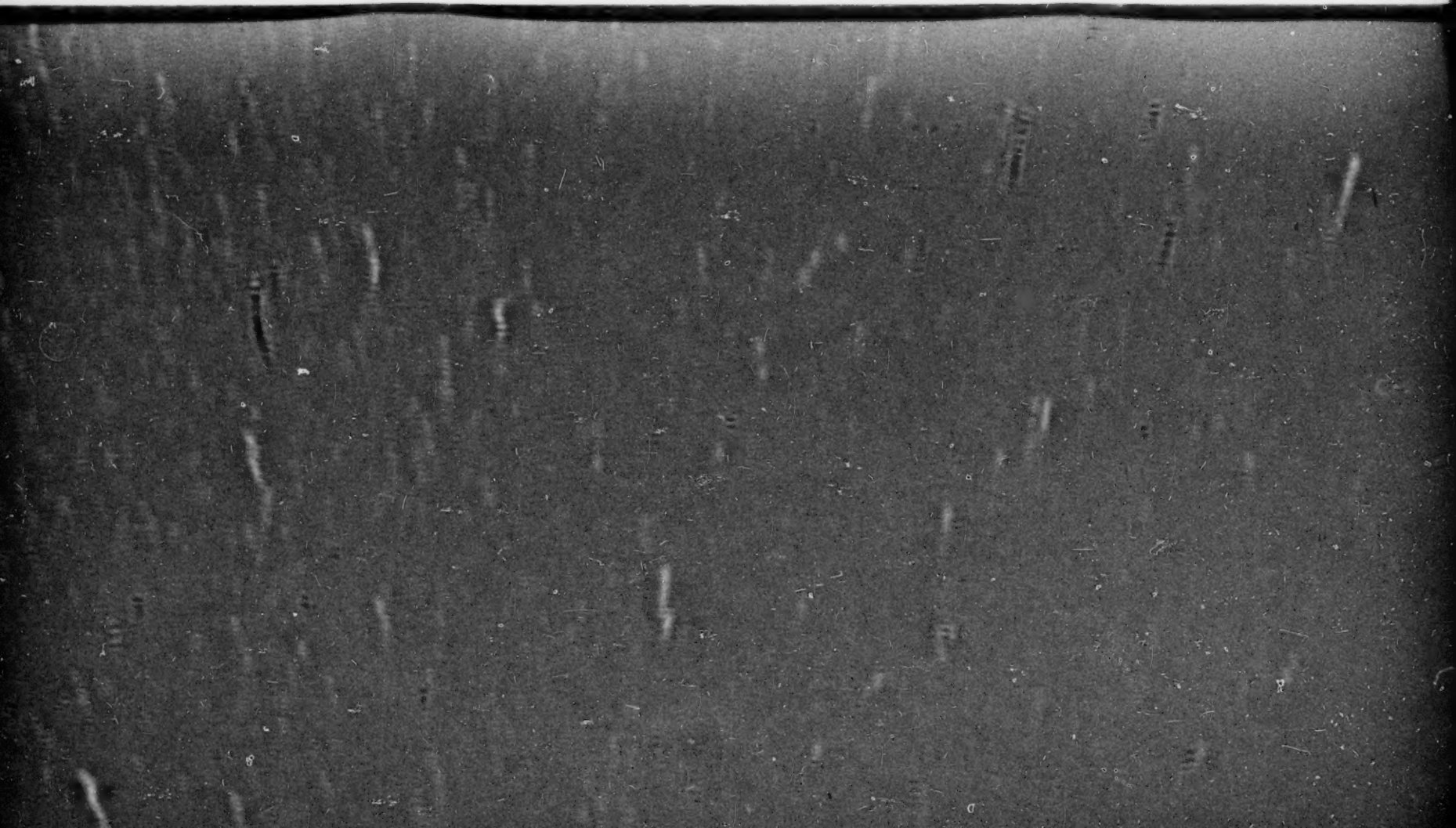

QUESTIONS PRESENTED

I. Should this Court exercise its power to consider questions raised for the first time in a petition for writ of certiorari or questions not implicated by the decisions of the courts below?

II. Is a district court's award of sanctions as provided by Rule 11 infirm simply because the opinion did not expressly recite the role which deterrence played in the specific sanction levied?

III. A. Do Fed. R. App. P. 38 and 28 U.S.C. § 1927 require a finding of bad faith prior to the imposition of sanctions under those provisions?

B. If bad faith were required, would an award of sanctions be improper merely because bad faith is not explicitly, but was implicitly, found?

IV. Are a litigant and his attorney—who failed to respond to motions for sanctions before the district and appellate courts, failed to request a hearing on the subject of sanctions, and failed to raise a disputed fact issue—denied due process by the imposition of sanctions following notice and an opportunity to respond as well as a remand to the district court for a determination of the amount of attorneys' fees on appeal and an apportionment of the sanction between them?

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No. 86-1164

In the Supreme Court of the United States

October Term, 1986

RUTH RAYNER and REVEREND JESSE L. DAVIS,

Petitioners,

v.

SHIRLEY CLENDENING,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case does not present sufficient details of the proceedings in the courts below for the Court to consider the questions presented.

In 1976, petitioner Jesse Davis, represented by petitioner Ruth Rayner, commenced a personal injury action in a Texas state court against Orkin Exterminating Com-

pany. After the jury returned a verdict in Orkin's favor in a second trial, Davis noticed an appeal and, through Rayner, requested that certain transcripts be prepared by respondent, Clendening, the official court reporter for the state trial court.

During the state appeal, Davis and Orkin reached a settlement, executed general releases, and jointly moved to dismiss the appeal. Following the dismissal, Clendening moved in the trial court for payment from Davis' appeal bond of her fees for preparation of the transcripts. Rayner (who indemnified the bonding company personally) and Davis opposed payment of those fees, complaining of the form, content, and timeliness of the transcripts. After a hearing before a second state district judge, the judge ordered that Clendening's fees, with minor adjustments, be paid to her from the appeal bond.

Davis appealed that order through the state judicial system. His appeal was dismissed both at the intermediate appellate and supreme court levels for lack of timely prosecution. At the same time Davis began his appeal of the state court order, he initiated an action pursuant to 42 U.S.C. § 1983 against Clendening in the United States District Court, alleging that the claimed derelictions of her duties as a state court reporter deprived Davis of due process in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Davis filed the § 1983 action after an unsuccessful offer to drop pursuit of the threatened federal action in exchange for "an amount equal to the [state court] Judgment of $3,231.50 and all costs related thereto and this appeal." In support of his claim that he was deprived of life, liberty, and property, Davis alleged claims of hu-

miliation, impairment of reputation, and aggravation of his "marital relationship beyond repair" as a result of Clendening's alleged derelictions.

Clendening moved in the § 1983 suit for summary judgment and for sanctions. On the merits, Davis offered an affidavit of Rayner identifying certain documents related to the state court litigation, and an unsigned affidavit purporting to be that of another court reporter. Davis offered no evidence in opposition to Clendening's motion for sanctions of attorneys' fees pursuant to Fed. R. Civ. P. 11 and 42 U.S.C. § 1988.[1] Petitioners challenged neither the standards for imposition of sanctions under Rule 11 nor the affidavit setting forth the amount of fees sought, and did not request a hearing on the sanctions question. The district court granted summary judgment in Clendening's favor on grounds of *res judicata* and Clendening's qualified immunity, and awarded Clendening her costs and attorneys' fees against Davis and Rayner.

Davis and Rayner, with Rayner acting as both appellant and attorney for herself and Davis, appealed to the court of appeals below. Clendening moved for the imposition of sanctions on appeal, to which neither Davis nor Rayner responded. The court of appeals affirmed the district court on the ground of qualified immunity, and declined to address the *res judicata* issue. The court of

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1. Although Davis, in his formal response to the motion for summary judgment, stated that plaintiffs' claims were "with foundation," "well grounded," "warranted by existing law," and "not interposed to harass," these assertions were not raised by affidavit, are wholly conclusory, and are not supported by any summary judgment evidence.

appeals also affirmed the district court's imposition of sanctions, finding that Davis knew or should have known that he could not overcome Clendening's qualified immunity without offering some evidence of bad faith or a violation of clearly settled law, and finding further that Davis pursued the action frivolously. Finally, the court of appeals awarded Clendening her costs and attorneys' fees on appeal, finding that Davis and Rayner disregarded the warning sent by the district court, pursued an appeal "no more reasonable than the underlying action . . ." previously found frivolous, and multiplied groundless proceedings. The court of appeals remanded the case to the district court for determination of the amount of attorneys' fees and costs, and for apportionment of them between Davis and Rayner.

Davis and Rayner petitioned for rehearing but did not raise in the petition any issue as to the propriety, amounts, or procedure involved in the district court's or court of appeals' award of attorneys' fees against Davis and Rayner. The petition for rehearing was denied.

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REASONS FOR DENYING THE WRIT

I. Summary Of The Argument.

This case does not present for review any of the hard questions which courts have faced or will likely face under Rule 11 or any federal statutory provisions for sanctioning litigants or attorneys. The arguments raised in the petition for certiorari were neither presented to the courts below nor passed upon by them. The issues raised by

petitioners as to the adequacy of the evidence supporting respondent's entitlement to and the amount of her attorneys' fees is a factual matter which petitioners wholly failed to address when the fact-finders below considered respondent's motions for sanctions and attorneys' fees at the trial and appellate court levels. Having failed to raise a disputed issue then, it is inappropriate for petitioners to claim the necessity for a hearing now, and entirely proper for the courts below to have awarded fees without a hearing. Petitioners' arguments that the courts below failed to apply the correct standards in awarding fees against them are incorrect as a matter of fact and law, were not presented to the deciding courts, and are not squarely implicated by the decisions of either the district court or the court of appeals.

An award of sanctions under Rule 11 does not require a specific articulation of the role of the deterrence function of the Rule, as opposed to its other functions of compensation and penalization. Moreover, the award of sanctions by the district court was correct in all respects.

The court of appeals' sanctions pursuant to Rule 38 and § 1927 were also appropriate. Both Rayner and Davis were subject to Rule 38, which, as all circuits have recognized, requires no finding of bad faith. Hence, the appropriate standard under § 1927 is not necessary to the decision below. Even under § 1927, however, the award of sanctions was appropriate, as those courts requiring bad faith do not give adequate consideration to the history and language of that section, which demonstrate that no bad faith is required. Even were bad faith a requirement under § 1927, the court of appeals implicitly found such bad faith in its opinion below.

Petitioners were afforded due process both at the district and appellate levels. They were given notice of respondent's motions for sanctions, but chose to disregard those notices. They did not raise a fact issue regarding sanctions. The court of appeals remanded the case for a determination, in which petitioners will have full opportunity to participate, of the amount of appellate attorneys' fees and an apportionment of liability between Rayner and Davis.

II. None Of Petitioners' Contentions Were Preserved For Review By The Court.

Petitioners failed to present to the courts below the arguments they now raise in their Petition. See discussion at p. 3 and n.1.

While the failure to raise an issue below does not jurisdictionally preclude this Court from its consideration, *Vance v. Terrazas,* 444 U.S. 252 (1980), the Court's normal practice is to decline review of questions presented for the first time in a petition for a writ of certiorari. *Equal Employment Opportunity Commission v. Federal Labor Relations Authority,* 476 U.S. —, 106 S.Ct. 1678 (1986) (dismissing writ of certiorari as improvidently granted); *Federal Trade Commission v. Grolier, Inc.,* 462 U.S. 19, 23 n.6 (1983); *Delta Airlines v. August,* 450 U.S. 346, 362 (1981) (issue presented in petition but not to court of appeals not properly before Supreme Court); *Youakim v. Miller,* 425 U.S. 231, 234 (1976) (deviating from general rule only in "exceptional cases"). This case presents none of the exceptional circumstances that would suggest deviation from the Court's normal practice, and the Court should decline to consider the issues not raised below.

III. The Award Of Attorneys' Fees At The District Court Level.

The courts below correctly decided the questions of respondent's entitlement to and the amount of her reasonable attorneys' fees in defending against the groundless § 1983 action in the district court. Reimbursement of the expenses occasioned by conduct in violation of Rule 11, including a reasonable attorneys' fee, is the one sanction expressly provided for in the Rule. In practice, it is that sanction to which courts most often resort. Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions,* 100 HARV. L. REV. 630, 634-35 n.19 (1987) (citing S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 40 (Federal Judicial Center 1985)). While deterrence is obviously one function of the imposition of Rule 11 sanctions, it is not the only one. Two others noted by KASSIN, *supra,* at 29, are penalizing the offender and compensating the offended party. An award of costs and fees to the victim is entirely consistent with the latter rationale. *See also,* Schwarzer, *Sanctions Under the New Federal Rule 11,* 104 F.R.D. 181, 201 (1985) (Rule 11 serves dual purposes of compensation and penalization). As noted by Judge Schwarzer, "The most direct consequence [of a Rule 11 violation] is reflected in the attorney's fees and other expenses inflicted on the other side. . . ." 104 F.R.D. at 200.

Petitioners' notion that an award of attorneys' fees under Rule 11 must expressly reflect the interplay between the deterrence function of the Rule and the specific award ordered is indeed a novel one. Understandably, petitioners do not advance with the same zeal any contention that such

an award must explicitly allude to the compensation function of the Rule. Here, the district judge was obviously cognizant of the multiple functions of Rule 11 when he noted that the Rule "authorizes imposition of an 'appropriate sanction,' including an award of attorney's fees, for violation of its provisions." The district judge, the person closest to the relevant facts through participation in the litigation, determined that the appropriate sanction here was imposition of joint and several liability against Davis and Rayner for the attorneys' fees incurred by Clendening. He explained the preferred sanction briefly, but clearly: " . . . Clendening is entitled to recover the attorney's fees she expended in defending this case." Petitioners did not challenge the district judge's reasoning in the court of appeals, which, employing the abuse of discretion standard of review, affirmed the lower court.

Petitioners acknowledge that the initial consideration in a sanction award is "the cost of the Rule 11 violation to the party seeking sanctions. . . ." (Petition, p. 8). Respondent supplied evidence of this cost to the district court. Petitioners offered no evidence in response. Hence, this case simply does not raise the issue of the appropriate weight to be given the deterrent function of Rule 11.

The district court was also correct in arriving at the amount of Clendening's reasonable attorneys' fees, using the "lodestar" method. *Hensley v. Eckerhart,* 461 U.S. 424 (1983). Respondent submitted evidence supporting the services performed, the hours expended, and the rate claimed. Although petitioners submitted no evidence on the question, the district court did adjust the amount of fees requested. Petitioners did not challenge the sufficiency of the evidence on attorneys' fees in Davis' motion

for new trial, in their appeal, or in their petition for rehearing in the court of appeals. Thus, petitioners failed at every stage of this proceeding to raise a single disputed fact issue as to the amount of Clendening's attorneys' fees.

The district court acted correctly in setting Clendening's fee, as did the court of appeals in affirming that determination.

IV. The Award Of Attorneys' Fees At The Appellate Level.

Based upon a finding that Davis and Rayner multiplied the groundless proceedings by their appeal, the court of appeals awarded further sanctions against both in the form of costs and attorneys' fees and remanded the case to the district court for a determination of the amount and for an apportionment of liability between the two. The court of appeals cited as authority for its award both Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1927, and petitioners now challenge the standards under which fees may be awarded pursuant to those provisions. This case, however, does not present the important questions petitioners suggest. Petitioners' arguments are raised for the first time in their petition for writ of certiorari. Further, the standard for sanctions under § 1927 is not necessarily before this Court, and under either Rule 38 or § 1927, the court of appeals correctly assessed attorneys' fees against petitioners.

A. Appellate Rule 38

Rule 38 provides that "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." The Ad-

visory Committee Notes unequivocally state, and petitioners concede, that an assessment of attorneys' fees falls within the ambit of "just damages" provided for in Rule 38. (Petition, p. 13). Petitioners' contention with regard to imposition of fees under that rule is that, prior to any such imposition, the court of appeals must expressly find bad faith by the rule's offenders.[2]

A finding of petitioners' bad faith is implied throughout the opinion of the court of appeals. The court stressed that Davis knew or should have known that his claims against Clendening were infirm in the absence of some evidence tending to undermine Clendening's qualified immunity. It also found that Davis and Rayner multiplied the groundless proceedings by frivolously appealing a claim summarily terminated by the district court and sanctioned as frivolous under Rule 11. At least one other court has found that a groundless appeal of an action found frivolous and sanctioned below is all but tantamount to an intentional abuse of process. *United States v. Nesglo, Inc.*, 744 F.2d 887, 892 (1st Cir. 1984) (counsel's "frivolous appeal of a sanction for bringing frivolous litigation borders on abuse of process"); *see also, Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486, 491 (2nd Cir.), *cert. denied*, 106 S.Ct. 3298 (1986) (awarding sanctions under Rule 38 where counsel raised same claims on appeal that district court previously sanctioned as frivolous or baseless); Annotation,

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2. This contention was not raised in the court of appeals. Petitioners filed no response at all to Clendening's motion for sanctions in the court of appeals, nor did their brief or petition for rehearing to the court of appeals advance any argument as to the appropriate standard for sanctions on appeal. For the reasons stated in Part II, this issue is therefore not appropriate for review by this Court.

Sanctions for Frivolous Appeals, 67 A.L.R. Fed. 319, 323-24 (1984) ("In the majority of cases, however, a court's determination of frivolity seems in itself to imply the existence of improper motive or bad faith and, hence, predetermines some award of costs or fees under Rule 38. . . . [I]t is a rare instance where a court will conclude that an appeal is frivolous but refrain from assessing costs or damages.") Thus, unlike the situation where sanctions are imposed for the first time on appeal, intentional behavior is implicit in the court's finding that petitioners here frivolously raised on appeal the same frivolous claims condemned by the district court.

Petitioners' arguments for imputing a bad faith requirement to Rule 38 are severely undermined by the purpose of the rule itself, by analogy to Fed. R. Civ. P. 11, and by the cases applying Rule 38. The Advisory Committee Notes to the rule explain that damages are awarded for a frivolous appeal "as a matter of justice to the appellee and as a penalty against the appellant." The first purpose of Rule 38 is to compensate prevailing parties in district courts for the expense and delay of defending against meritless appeals. *Ruderer v. Fines,* 614 F.2d 1128, 1132 (7th Cir. 1980). The finding of frivolousness strikes a balance between these considerations; an additional bad faith requirement would disserve the first goal of the rule.

By analogy to Fed. R. Civ. P. 11, permitting sanctions for the filing of a factually groundless and legally unwarranted pleading, the lower federal courts require no finding of bad faith prior to an award of sanctions under that rule.[3] Petitioners offer no argument as to why the stan-

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3. Petitioners do not suggest that a finding of bad faith is required under Rule 11.

dard at the appellate level should be any more solicitous of the offending party, and indeed it should not be. In the case of a frivolous appeal of a claim found frivolous by the district court, it would be particularly anomalous if a party, who had already been sanctioned by the district court, were insulated from sanctions on appeal by a more stringent, subjective bad faith requirement. Such an added requirement would remove the very disincentive to appeal a frivolous claim which Rule 11 interposes to its initial filing, and would instead all but insure the appeal of every Rule 11 sanction, since no bad faith is required for the latter.[4]

Nor do the courts of appeal support petitioners' argument for the implication of a bad faith requirement for the imposition of sanctions under Rule 38. No court of appeals has consistently required more than a finding of frivolousness to levy sanctions under Rule 38.[5] The stan-

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4. The move from a subjective bad faith standard to the objective standard now embodied in the 1983 amendments to Rule 11 was necessitated by the inefficacy of the former rule to curb abuses in the federal courts. American Bar Association Section Of Litigation, *Sanctions: Rule 11 And Other Powers* 4 (American Bar Association 1986). Despite this recognized deficiency, petitioners urge the Court to adopt a subjective standard for the filing of frivolous appeals.

5. All of the cases cited by petitioners in support of their argument for a bad faith test under Rule 38 are from the Seventh Circuit. That circuit has now rejected any subjective bad faith test under Rule 38. See text at p. 14. Although one Second Circuit case has held that bad faith is a prerequisite to Rule 38 sanctions, *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2nd Cir.), *cert.*

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dard generally applied is that employed by the First and Ninth Circuits in *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir.), *cert. denied*, 469 U.S. 1018 (1984) (fees on appeal may be awarded if appeal is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"); and *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984) (appeal is frivolous under Rule 38 "when the result is obvious . . . or appellant's arguments are wholly without merit").[6] The Seventh Circuit,

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denied, 404 U.S. 871 (1971), the court there was jointly considering the standard under 28 U.S.C. § 1912, 28 U.S.C. § 1927, and Rule 38. In other Second Circuit cases since *Pfizer*, the court, considering only Rule 38, has awarded fees against both litigants and attorneys without a finding of bad faith. *Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486 (2nd Cir.), *cert. denied*, 106 S.Ct. 3298 (1986); *Paulson v. United States*, 758 F.2d 61 (2nd Cir. 1985); *Teledyne Industries, Inc. v. Podell*, 546 F.2d 495 (2nd Cir. 1976).

6. Every circuit now imposes sanctions under Rule 38 without a finding of subjective bad faith.

First Circuit: *Johnson v. Allyn & Bacon, Inc.*, cited in text.

Second Circuit: See note 5, *supra*.

Third Circuit: *Sun Ship, Inc. v. Matson Navigation, Inc.*, 785 F.2d 59, 64 (3rd Cir. 1986). ("Rule 38 focuses on the merits of the appeal regardless of good or bad faith").

Fourth Circuit: *Sparrow v. Commissioner of Internal Revenue*, 748 F.2d 914 (4th Cir. 1984).

Fifth Circuit: *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888 (5th Cir. 1985).

Sixth Circuit: *Perkins v. Commissioner of Internal Revenue*, 746 F.2d 1187 (6th Cir. 1984).

Seventh Circuit: See *Bacon* and *Coleman* cases, discussed in text.

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which requires a finding of frivolousness as well as a determination that sanctions are appropriate, has recently rejected any subjective bad faith standard. In *Bacon v. American Federation of State, County and Municipal Employees Council #13*, 795 F.2d 33, 35 (7th Cir. 1986) the court, even under the more indulgent standard applied to a *pro se* litigant, imposed sanctions *sua sponte*, and held that

> [i]t is no defense [to the imposition of sanctions under Rule 38] that the pro se litigant may not have thought his cause hopeless; we cannot peer into a litigant's mind; it is enough that a reasonable person in his position would have known that he had no basis for challenging the district court's decision.

Accord, Coleman v. Commissioner of Internal Revenue, 791 F.2d 68, 71 (7th Cir. 1986) (Seventh Circuit standard for imposition of sanctions under Rule 38, Fed. R. Civ. P. 11, and 28 U.S.C. § 1927 is purely an objective one, and court should impose sanctions when a "person should have known that his position is groundless"). Thus, no court of appeals presently imposes the requirement that peti-

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Eighth Circuit: *Standridge Flying Service v. Department of Transportation*, 712 F.2d 1223 (8th Cir. 1983).

Ninth Circuit: See *Taylor v. Sentry Life Ins. Co.*, cited in text.

Tenth Circuit: *Charczuk v. Commissioner of Internal Revenue*, 771 F.2d 471 (10th Cir. 1985).

Eleventh Circuit: *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983).

District of Columbia Circuit: *Furbee v. Vantage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972).

Federal Circuit: *United States v. Atkinson*, 748 F.2d 659 (Fed. Cir. 1984).

tioners urge the Court to adopt, and petitioners advance no arguments as to why such a bad faith standard under Rule 38 should be implied. In short, this case presents no occasion for review of the standard under Rule 38 by this Court.

B. 28 U.S.C. § 1927

The court below cited, in addition to Rule 38, 28 U.S.C. § 1927 as a basis for its award of sanctions against petitioners for pursuing a frivolous appeal.[7] Petitioners, citing a split of authority among the circuits, contend that a finding of bad faith is required prior to an award under that section, and argue that review by this Court is needed to resolve the conflict. Review of this case, however, is unwarranted for several reasons.

First, this case does not squarely present for review the issue of the appropriate standard under § 1927, because the court of appeals below awarded sanctions against both Davis and Rayner under Rule 38, which requires no finding of bad faith. On appeal to the court below, petitioner Rayner occupied the status of appellant herself as well as of attorney to appellant Davis. Thus she was subject to the strictures of Rule 38 to the same extent that

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7. 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

Davis was.[8] The court of appeals' award of attorneys' fees on appeal stands sufficiently under the authority of Rule 38 without any reliance on § 1927 or the standard for applying it.

Second, petitioners failed to raise the issue of the appropriate standard for sanctions under § 1927 before the court of appeals. Petitioners did not even respond to respondent's motion for sanctions to that court, and did not raise the point in their petition for rehearing. For the reasons discussed previously, the Court should deny review of that issue now. See Part II at 6.

Third, a finding of bad faith is implicit in the opinion of the court of appeals. See discussion at pp. 10-11, *supra*. Even the court of appeals for the Third Circuit, which reads a bad faith requirement in § 1927, does not require such a finding to be made expressly in the court's opinion. *Baker Industries v. Cerebus Ltd.*, 764 F.2d 204, 209 (3rd Cir. 1985) (affirming award under § 1927 despite absence of express finding of bad faith where bad faith was evident from record as a whole).

Finally, even in the absence of a finding of bad faith, sanctions against Rayner under § 1927 are appropriate.

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8. Even were Rayner not a litigant herself before the Fifth Circuit, she would be subject to Rule 38, as that Rule has been construed to reach not only an appellant, but his attorney as well. *Bartel Dental Books, supra*, 786 F.2d at 491; *Des Vignes v. Dept. of Transportation, Federal Aviation Administration*, 791 F.2d 142 (Fed. Cir. 1986), *cert. denied*, 107 S.Ct. 185 (1986); *International Union of Bricklayers & Allied Craftsmen Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1407 n.8 (9th Cir. 1985) (Rule 38 coupled with inherent power of the court).

While some circuits have created a bad faith requirement as a prerequisite to sanctions under § 1927, that requirement is not justified.[9] Section 1927 permits an award of

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9. Petitioners' characterization of the "split" among circuits on this point (Petition, p. 11) is inaccurate. Petitioners failed to note that the District of Columbia Circuit has rejected a bad faith requirement under § 1927. *Reliance Ins. Co. v. Sweeney Corp, Maryland,* 792 F.2d 1137 (D.C. Cir. 1986).

   Contrary to petitioners' assertion that the Second, Third, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits "will only impose sanctions when there is clear evidence of 'bad faith,'" (Petition, p. 11), in fact only the Second, Third, and Ninth Circuits require bad faith under § 1927.

   In *Blair v. Shenandoah Women's Center, Inc.,* 757 F.2d 1435 (4th Cir. 1985), cited by petitioners, the Fourth Circuit upheld the district court's finding of bad faith, but did not hold that any such finding was required prior to imposing sanctions under § 1927.

   In *Knorr Brake Corp. v. Harbil, Inc.,* 738 F.2d 223, 227 (7th Cir. 1984), also cited by petitioners, the Seventh Circuit expressly disavowed any subjective bad faith requirement. "This court has not required an express finding by the district court of subjective bad faith or intent to delay to support an award of fees under section 1927." Rather, "some degree of culpability on the part of counsel is required." *Id.* The court went on to note that such culpability may be inferred "from a total lack of factual or legal basis for a suit." *Id.*

   In *Jaquette v. Black Hawk County,* 710 F.2d 455 (8th Cir. 1983), the Eighth Circuit did not enunciate any standard under § 1927; the court's reference to bad faith was in connection with a court's *inherent* power to impose sanctions. *Cf. Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980). In *Hughes v. Hoffman,* 750 F.2d 53 (8th Cir. 1984), the Eighth Circuit imposed sanctions against counsel pursuant to § 1927, 28 U.S.C. § 1912, and FRAP 38 without a finding of bad faith.

   The case attributed by petitioners to the Eleventh Circuit, *Estate of Blas v. Winkler,* 792 F.2d 858 (9th Cir. 1986), is in fact a Ninth Circuit case.

attorneys' fees against an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously. . . ." As this Court has held, "the term 'vexatious' *in no way implies* that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978) (emphasis added). This reasoning has been recognized by courts of appeal considering § 1927. *Charczuck v. Commissioner of Internal Revenue*, 771 F.2d 471, 476 (10th Cir. 1985); *McCandless v. Great Atlantic and Pacific Tea Co., Inc.*, 697 F.2d 198, 200-201 (7th Cir. 1983).

This Court's decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), and the history of § 1927, further preclude any implication of a bad faith requirement. In *Roadway Express*, the Court, applying a previous version of § 1927 that did not expressly allow for the assessment of attorneys' fees but only for assessment of "costs," recognized that courts have "inherent power," apart from any statute, to assess attorneys' fees against counsel who acted in bad faith. 447 U.S. at 766. The trial court had not made specific findings of bad faith necessary to support an award under this inherent power. The Court nevertheless affirmed liability for costs under § 1927, despite the absence of a finding of bad faith, but denied attorneys' fees because "costs" under that section did not include them.

Following the decision in *Roadway Express*, Congress amended § 1927 expressly to allow for the assessment of attorneys' fees. 28 U.S.C. § 1927 (1982) (as amended by Pub. L. No. 96-349, § 3, 94 Stat. 1156 (1980)). Were bad

faith a prerequisite to an award of attorneys' fees under § 1927, then Congress' amendment of that statute would be rendered superfluous, because the Court had previously recognized the inherent power to sanction bad faith conduct with an award of attorneys' fees. This was recognized in *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986):

> To hold that subjective "bad faith" remains as necessary under amended § 1927 as under *Roadway Express* would be to assume that the amendment added nothing to the "inherent powers" recognized in that case. Since we must assume that Congress intended the post-*Roadway Express* change in § 1927 to have effect, we hold that 28 U.S.C. § 1927 authorizes a court to assess fees against an attorney for "unreasonable and vexatious" multiplication of litigation despite the absence of any conscious impropriety.

789 F.2d 1225, 1230. *Cf. McCandless, supra*, 697 F.2d 198, 201 n.4 (acknowledging same reasoning without deciding issue).

Section 1927 does not by its terms require bad faith for the imposition of attorneys' fees. The history of § 1927 forecloses petitioners' argument that such a requirement may be implied. In any event, construction of the statute by this Court is not appropriate because petitioners did not raise the question below and the decision below stands sufficiently under the authority of Appellate Rule 38.

V. The Procedure Employed By The Courts Below To Afford Petitioners Due Process.

The district court awarded sanctions against petitioners following respondent's motion for summary judg-

ment and for sanctions. That motion and the supporting memorandum expressly refer to Fed. R. Civ. P. 11 and argue for the propriety of sanctions thereunder. An affidavit of respondent's attorney describing the services rendered, total hours, and reasonable fees expended accompanied the motion for sanctions. Petitioners did not raise any fact issue in response, but only stated as conclusory "issues of law" that Davis' claims were "with foundation," "well grounded," and "warranted by existing law," largely parroting the language of Rule 11. Petitioners did not request a hearing and did not raise the hearing issue in their motion for a new trial, their appeal to the court of appeals, or their petition for rehearing to that court.

The court of appeals awarded sanctions against Davis and Rayner upon respondent's motion for sanctions. Again, respondent briefed the appellate sanctions issue and offered the affidavit of her attorney in support of the attorneys' fees sought. Petitioners failed to reply to the motion, filed no reply brief, and did not otherwise address the appellate sanctions issue before decision or in their petition for rehearing. Nevertheless, the court below remanded the case to the district court for a determination of the amount of respondent's appellate attorneys' fees and for an apportionment of liability for those fees between Rayner and Davis.

Contrary to petitioners' assertion, this case raises no due process issues whatsoever. While there is no question that due process must be afforded prior to the imposition of sanctions, it is equally apparent that due process was afforded here.

The courts, commentators, and the relevant rules and statutes themselves suggest that due process does not require a hearing prior to the imposition of sanctions. In *United States v. Nesglo, Inc.*, 744 F.2d 887 (1st Cir. 1984), the court of appeals held that the district court did not deny an attorney due process where the attorney "had adequate notice of appellees' motion [for fees under § 1927] and the deadline for responsive papers but chose to disregard them." 744 F.2d at 890. The court added that a hearing prior to an award of fees is not uniformly required, especially when the court awarding fees was sufficinetly familiar with the parties and the litigation. *Id.* In any event, due process under Fed. R. Civ. P. 11 does not always require an evidentiary hearing; rather, the notice and opportunity requirement may be satisfied by the fact that the district judge has full knowledge of all relevant facts through participation in the proceedings. *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir. 1986). Even in *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3rd Cir. 1985), cited by petitioners (Petition, p. 17), the Third Circuit recognized that a hearing is not always required. 757 F.2d at 571. *See also, Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194 (7th Cir. 1985) (hearing not required under Rule 11 where claims were objectively frivolous).

The Advisory Committee Notes to Fed. R. Civ. P. 11 explicitly recognize the need for due process, yet evidence a strong presumption against excessive procedural undertakings.

> In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record.

See also, Schwarzer, *Sanctions Under the New Federal Rule 11,* 104 F.R.D. 181, 198 (1985) ("[b]ecause ordinarily the opposition [to the imposition of sanctions under Rule 11] will consist of an explanation and justification, it can be adequately presented by memorandum and declarations").

The history of 28 U.S.C. § 1927 suggests that Congress, while cognizant of due process requirements, did not believe that a hearing was necessary for imposition of attorneys' fees under that section. When § 1927 was amended in 1980, the proposed Senate version included an express requirement that "costs, expenses, and attorneys' fees shall be imposed under this section upon motion of any party only after a hearing, held after trial."[10] This hearing requirement was rejected in the final version of amended § 1927, though the need for due process was nevertheless recognized. See 126 CONG. REC. 23625-26. Implicit in Congress' action is the conclusion that due process under § 1927 does not require a hearing.

Petitioners' citation to *Miranda v. Southern Pacific Trans. Co.,* 710 F.2d 516 (9th Cir. 1983) is misleading in the context of the present case. There the Ninth Circuit, in a sanctions case under a local court rule, afforded the

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10. *Antitrust Procedural Improvement Act of 1979: Hearings on S.390 before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. 138 (1979).

procedure provided by Fed. R. App. P. 46(c) for disciplining counsel. That rule, however, only contemplates "reasonable notice and an opportunity to show cause to the contrary, and after hearing, *if requested*. . . ." (emphasis added). Here, petitioners received notice that sanctions were being sought at both the district and appellate levels. They did not avail themselves of the opportunity to respond, they did not request a hearing, and they did not raise a fact issue suggesting the need for a hearing.

Petitioner Rayner contends that she had no opportunity to defend herself "once the decision was made that sanctions were seriously contemplated." (Petition, p. 16). In fact, Rayner had both notice and an opportunity to respond to Clendening's motions for sanctions at both the district and appellate levels, but chose to ignore those opportunities. Her contention that she was entitled to an update from the court as to its inclination to impose sanctions hardly deserves serious consideration. As Judge McGowan astutely spoke for a majority of the District of Columbia Circuit sitting *en banc*, "objections to documentation [supporting a claim for attorneys' fees under Title VII], like requests for evidentiary hearings, must be made to the District Court; one cannot, after receiving an unfavorable ruling from the trial judge, concoct objections for use on appeal." *Copeland v. Marshall*, 641 F.2d 880, 905 (D.C. Cir. 1980) (*en banc*).

Petitioners' assertion that the approach "approved" by the court of appeals here conflicts with the sanctions provisions and with other circuits is therefore legally and

factually wrong.[11] Due process considerations certainly inform the issue of sanctions for frivolous litigation; none of those considerations, however, was neglected in this case, as its particular facts reveal that petitioners received all of the due process to which they were entitled.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should in all respects be denied.

Respectfully submitted,

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11. The Fifth Circuit has held that a hearing on an award of attorneys' fees is required *if there are disputed issues of fact. King v. McCord*, 621 F.2d 205, 206 (5th Cir. 1980); *Cook v. Ochsner Foundation Hospital*, 559 F.2d 270 (5th Cir. 1977) (remand for hearing where affidavits created a conflict); *Matter of First Colonial Corp. of America*, 544 F.2d 1291, 1300 (5th Cir.), *cert. denied*, 431 U.S. 904 (1977). Petitioners raised no fact issues and the procedure required by those cases never came into play.